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VIA EMAIL AND U.S. MAIL
Kellie.z.myers@nccourts.org

The Honorable Paul Ridgeway
Senior Resident Judge
Wake County Justice Center
300 S. Salisbury Street
Raleigh, NC 27602

The Honorable Alma L. Hinton
Senior Resident Judge
Halifax County Courthouse
357 Ferrell Lane
Halifax, NC 27839

The Honorable Joseph N. Crosswhite
Senior Resident Judge
Hall of Justice
226 Stockton Street
Statesville, NC 28677

Re: *Procedural Posture for* Common Cause et al. v. Lewis et al., *18-CVS-14001 (N.C. Super.)*

Dear Judges Ridgeway, Hinton, and Crosswhite:

We write on behalf of the Legislative Defendants and the State of North Carolina (see N.C. Gen. Stat. § 1-72.2) in response to the letter from Mr. Jones dated January 18, 2019, along with the others the Court has received from Plaintiffs' counsel in this case. Although we doubt a duel of letters is the appropriate procedure for addressing the issues Plaintiffs' correspondence has raised and are prepared to respond to Plaintiffs' request to expedite the case on whatever timeline the Court requires, we feel compelled to respond to Plaintiffs' gratuitous and erroneous commentary on the procedural history of the case so far.

While Plaintiffs named multiple executive and legislative officers as Defendants in this action, the real-party defendant is the North Carolina General Assembly, which exercises the "sovereign power" of the state. *State ex rel. Ewart v. Jones*, 116 N.C. 570, 21 S.E. 787, 787 (1895); *see also In re Spivey*, 345 N.C. 404, 413, 480 S.E.2d 693, 698 (1997); *Smith v. Mecklenburg County*, 280 N.C. 497, 512, 187 S.E.2d 67, 77 (1972). We note this here because of the extraordinary nature of this case: Plaintiffs demand that this Court seize that sovereign power for itself by using amorphous and nonjusticiable standards which do not appear in the State Constitution to invalidate the General Assembly's redistricting plans and enact through judicial fiat plans which satisfy Plaintiffs' partisan preferences. Moreover, Plaintiffs seek to proceed to that end on a timeline that is hasty and irresponsible in light of the importance of the case. They ask the Court to assume it will ultimately agree with Plaintiffs and choose to "provide effective relief" and work backwards from that assumption to identify an appropriate litigation timeline. 1/18/19 Letter from Jones and Speas to the Court at 1. Nothing could be more contrary to the strong presumption that the challenged redistricting plans are constitutional and the principle that, "[i]f there is any reasonable doubt" on that question, "it will be resolved in favor of the lawful exercise of their powers by the representatives of the people." *State ex rel. Martin v. Preston*, 325 N.C. 438, 449, 385 S.E.2d 473, 478 (1989) (quoting *Glenn v. Board of Education*, 210 N.C. 525, 529–30, 187 S.E. 781, 784 (1936)). Nor does Plaintiffs' position have any grounding in ordinary principles of due process.

Contrary to Plaintiffs' novel view of due process, the General Assembly has at least the same right as any other litigant to vigorously defend itself from baseless claims. And that is most certainly true when the litigant before the Court is a branch of government co-equal to the North Carolina Supreme Court. The Court should decline Plaintiffs' invitation to set a schedule based on a deeply flawed assumption that Plaintiffs are entitled to any relief. There is no reason to assume, as Plaintiffs do, that the Court will somehow find a legal basis for adding yet more redistricting rules to the North Carolina Constitution, which already imposes some of the most stringent redistricting restrictions of any constitution in the nation. Plaintiffs' theory of law is nowhere in the Constitution's text and requires judicial assumption of the redistricting responsibility for what Plaintiffs candidly admit is an effort to elect more members of their preferred political party to the legislature. Moreover, the novelty of Plaintiffs' position itself weighs in favor of a schedule that allows ample time for vetting their positions. Because they undoubtedly will present complex social-science expert methodology and testimony, we must have ample time to respond in kind, which will require developing methods to demonstrate both the flaws in their approach and the merits of the challenged legislation. This is no reason to hurry this case, and there is every reason to proceed with caution and due care.

Plaintiffs complain about the timing of this case, but they chose that timing. They could have filed this case in September 2017 as soon as the 2017 Plans were enacted. They also could have brought their "partisan gerrymandering" theory against the 2011 plans (which they also charge violated their legal theory) years ago. Instead, they did not file their complaint until November 2018—seven days after the outcome of the 2018 elections became clear. Then they filed an

amended complaint several weeks later. Their delay is neither this Court's nor the General Assembly's emergency.

Plaintiffs also complain of the General Assembly's removal to federal court, but their version of events directly contradicts reality. Although the federal district court disagreed with the General Assembly's asserted bases of removal, it expressly rejected Plaintiffs' argument that removal was "baseless." It made the very opposite holding: "[t]he Legislative Defendants did not lack an objectively reasonable basis for seeking removal." Memorandum Opinion at 17. It also rejected Plaintiffs' argument that the General Assembly somehow improperly sought delay. *See id.* Removal was, in the district court's telling, an exercise of the General Assembly's "right under [the] law to assert grounds for removal to this court." *Id.* Plaintiffs' disagreement with the federal district court does not somehow make their narrative factually correct; it makes it *in*correct.

Nor can Plaintiffs claim surprise at the removal because their own counsel attempted removal in a redistricting case last cycle—with far less of a legal basis than the General Assembly had in this case. These are entirely legitimate and predictable litigation events, and the way for Plaintiffs to account for them was to file the case earlier, not to delay a year and complain about other parties' legitimate choices, which have impacted the case schedule far less than their own delay.

In short, the case is where it is as a result of (1) Plaintiffs' delay in filing it, (2) legitimate choices of the General Assembly in defending this case, and (3) the rules of civil procedure. Moreover, the General Assembly has the right to take the time to develop a factual and legal record to defend this case. That will, we expect, include a robust presentation from fact and expert witnesses. While we believe that Plaintiffs' demand for instant judicial action should be rejected, we look forward to filing a response to Plaintiffs' motion on whatever timeline is ultimately ordered by the Court.

Sincerely,

E. Mark Braden

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cc: All Counsel of Record